

ORIGINAL

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	92-52
	)	
Reexamination of the Policy	)	RM-7739
Statement on Comparative	)	RM-7740
Broadcast Hearings	)	RM-7741

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARYCOMMENTS

Caldwell Broadcasting Limited Partnership ("Caldwell"), by its attorneys and pursuant to the Federal Communications Commission's ("FCC" or "Commission") Second Further Notice of Proposed Rulemaking, FCC 94-167 (released June 22, 1994), hereby submits its comments on the modification of the criteria used in comparative hearings to award construction permits for new broadcast facilities. The Commission has asked for such comments following the invalidation of its integration policy by the U.S. Court of Appeals for the District of Columbia Circuit in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). As discussed more fully below, the Commission should henceforth use as independent comparative criteria the factors that previously constituted enhancements of integration. Thus, these factors should replace integration credit and in the aggregate have the same weight as integration previously had. The Commission also should award a finder's preference to applicants that successfully petition for the allotment of a new broadcast frequency. Finally, the Commission should take steps to minimize any further costs and

delay in deciding pending comparative cases consistently with the mandate of Bechtel.

**I. Background**

Caldwell is one of several applicants for a new VHF television station in Columbia, Louisiana. The Commission's decision in the case, which turned on the application of the integration policy, was appealed to the U.S. Court of Appeals for the District of Columbia Circuit. Following the invalidation of that policy in Bechtel, the Court reversed and remanded the case to the FCC. Caldwell Broadcasting Limited Partnership v. FCC, No. 92-1343, 1994 U.S. App. LEXIS 13767 (D.C. Cir. Feb. 3, 1994) (per curiam). The case remains pending before the Commission.

**II. The Commission Should Award Comparative Credit to Applicants Using the Factors That Previously Enhanced Integration Credit**

In Bechtel, the Court of Appeals invalidated only the Commission's policy of awarding credit to applicants for their proposals to integrate owners into the day-to-day management of a new station. The Court did not call into question the factors used by the Commission -- local residence and participation in civic activities, minority status, and past broadcast experience -- to enhance the comparative credit granted for proposed owner-managers. Indeed, the Court's discussion in Bechtel exhibits an appreciation of the value of these factors. Thus, the Commission may fully comply with Bechtel by awarding comparative credit to

applicants whose owners have these qualifications.<sup>1/</sup> Moreover, for both substantive and procedural reasons, the award of credit based on these factors to all of an applicant's active owners is the most appropriate course of action for the Commission to take. The Commission need not restructure its entire comparative hearing process, but should simply replace integration credit with credits based on the former enhancement criteria that would have the same weight in the aggregate as integration credit previously had.

The Commission should retain its former enhancement criteria as factors in its comparative analysis above all because these criteria, particularly local residence and minority status, promote fundamental goals of the FCC. One of the Commission's most basic aims is to grant applications that will provide the best practicable service to the public,<sup>2/</sup> an objective which the Commission has equated with service that best addresses local community needs. Notice, 7 FCC Rcd at 2665. Thus, the Commission has looked for ways of ensuring that broadcast stations are responsive to the particular problems and issues of

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<sup>1/</sup> The Commission should continue to award preferences only to those owners who will have a voice in establishing the station's policies. Thus, the Commission should retain the distinctions it has traditionally recognized between active and passive ownership interests.

<sup>2/</sup> As the Commission stated when it initiated this rulemaking proceeding, this goal is "integral to Commission regulation generally." Notice of Proposed Rulemaking, 7 FCC Rcd 2664, 2665 (1992) ("Notice").

concern to local areas. Other fundamental goals of the Commission in awarding broadcast licenses are the related objectives of a maximum diffusion of control and diversity of programming. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 383, 384 (1965); Metro Broadcasting v. FCC, 497 U.S. 547 (1990).<sup>3/</sup>

Local residence in a community or service area obviously contributes importantly to an applicant's ability to serve that area. As the Court of Appeals suggested in Bechtel, familiarity with a community is the best indicator of an awareness of community needs. Bechtel, 10 F.3d at 885. And, clearly, it is through local residence that familiarity with a community is acquired. Indeed, the Bechtel Court found it incongruous that, under the Commission's former comparative analysis, even long-term local residence received credit only as an enhancement of integration. Id. The Commission, too, has recognized the crucial role of local residence in the achievement of its goal of the best practicable service and thus stated in its initial Notice in this proceeding that "if integration of ownership into management is no longer found to be worthy of retention as a comparative criterion, local residence of the owner may take on even greater importance to ensure a degree of

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<sup>3/</sup> Because diffusion of control is such an important goal of the FCC, the Commission should continue to consider media diversification as a factor in its comparative analysis.

contact and familiarity with the service area." Notice, 7 FCC Rcd at 2667.

Local residence should indeed be used as a separate comparative factor. Owners who have lived in a community or service area, particularly those whose residence is long-term and who have actively participated in civic activities, are in a far better position than those who have not resided there to assess local needs and ensure that the station addresses those needs. Civic participation is particularly important, as those who are civic leaders are particularly likely to be responsive to community concerns. The length of local residence should also be determinative of how much credit an owner receives.

The Commission stated in its Notice that it would not eliminate the minority preference even if the integration policy were abolished, noting that it is prohibited by Congress from doing so. Id. The Commission has, however, expressed the opinion that the treatment of minority ownership as a separate comparative factor could be reconciled with Congress' prohibition against diluting the minority preference as long as the proportionate weight given to the preference is not altered. Id. Caldwell agrees that minority ownership should continue to be taken into account because of its role in achieving diversity in broadcasting. Thus, all owners of an applicant who are members of minority groups should receive credit for their minority status.

Local residence and minority status have been given equal weight in the comparative analysis, which is appropriate because these factors promote equally fundamental public interest goals -- service responsive to local needs, the diffusion of control, and diversity of views. Past broadcast experience, on the other hand, may enhance an owner's ability to provide high-quality service but it promotes neither localism nor diffusion of control and tends in fact to defeat these goals. Thus, past broadcast experience, which has been considered the least important qualitative enhancement, should continue to be accorded the least weight of all the comparative factors.

**III. The Commission Should Award Comparative Credit to Applications That Successfully Request a New Frequency Allotment**

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In its Notice, the Commission sought comment on whether to award a comparative preference to applicants that successfully requested the allotment of a new broadcast frequency. Caldwell believes that such a preference should be awarded, because it would promote the goal of ensuring responsive service to the local community, one of the Commission's most fundamental objectives. By rewarding those who undertake to secure the allotment of a new frequency to a particular community, the Commission would encourage applicants to make this effort. As others have pointed out, a finder's preference would also facilitate the award of licenses to newcomers, including minorities, thus fostering diversity in the broadcast industry.

See Notice, 7 FCC Rcd at 2668. Local residents in particular should be rewarded for endeavoring to bring a new station to their own community, in which they have a special interest.

**IV. The Commission Should Minimize Cost and Delay in  
Implementing Its Post-Bechtel Comparative Criteria**

Pending cases can, and should, be decided applying the Commission's traditional enhancement criteria and finder's preferences with minimal further proceedings. In cases such as the Columbia proceeding, which was initiated more than nine years ago and has been fully briefed at the hearing, Review Board and Commission levels, further proceedings will only serve to delay the realization of the benefits to the public that the Commission's comparative proceedings are intended to produce.<sup>4/</sup> In many, if not most, pending cases the parties to the proceeding will have already developed a record that is sufficient to judge their entitlement to enhancement criteria as well as any finder's preference. The Commission should offer an opportunity for the parties to submit briefs on the application of the criteria to their applications. Where, as in the case of the Columbia proceeding, the proceeding has already been litigated through the Commission level and the parties have had ample opportunity both

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<sup>4/</sup> As reflected in the record of the Columbia proceeding, the group that ultimately formed Caldwell first petitioned for the allocation of a license to Columbia in 1985. Caldwell has thus been involved in attempting to secure the license for Channel 11 for over nine years.

to establish the entitlement of non-passive owners to comparative enhancement and to challenge the claims made by rivals, the case should promptly be decided by the Commission without further proceedings.

**V. Conclusion**

The Commission should modify its comparative broadcast hearing process by using as independent comparative criteria the factors that previously constituted enhancements of integration, thus awarding credit based on these factors to all of an applicant's active owners. These factors should have the same relative weight as formerly and in the aggregate should have the same weight as integration credit previously had in the comparative analysis. The Commission also should award a finder's preference to applicants that successfully petition for the allotment of a new broadcast frequency.

Respectfully submitted,

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